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No. 208

IN THE

Supreme Court of the United States

October Term, A. D. 1962.

MILDRED SEXTON, Executor of the Last Will of Bertha Birk Klein, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF TO THE BRIEF IN OPPOSITION

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The Government's Brief in Opposition fails to come to grips with any of the arguments made in the Petition for Writ of Certiorari. This failure makes it evident that there is no reasonable basis for refuting the position taken by the petitioner.

1. The Brief in Opposition completely ignores the controlling fact that the decedent joined in only the first two extension amendments and survived the periods established by those amendments. The last extension, in 1955, was made during her lifetime without her consent or the consent of her conservator or any other person acting in her behalf. It was the 1955 extension and not the two in which she joined which permitted her to receive income until her death. Instead of acknowledging this fact, the

Government's brief wrestles with the truth when it states the erroneous conclusion that the "Petitioner[1] did retain the right to receive the income for a period which did not in fact end before her death." (Br. in Op. 6)

The fact that the periods during which the decedent retained income had in fact ended prior to her death was made crystal clear in the Petition (pp. 2, 3, 11 and especially 12 and 13). However, it takes a microscopic reading of the Brief in Opposition to find any recognition of this fact. There are only two references to the final amendment. One appears on page 8 and merely states that this amendment contains a recital similar to the ones contained in the earlier extensions. The other appears on page 4 and states that: "The final amendment extended the date to March 2, 1965." A footnote at this point reveals that "On April 9, 1954, when the decedent was 91 years of age, she was judicially declared an incompetent and a conservator of her estate was appointed."

Plainly the Government knew that the decedent did not and could not join in the third extension.

It would seem that candor called for an honest recognition of this controlling fact and plain dealing with the problems it presents.

The Government's treatment of this matter can only lead to the conclusion that it cannot counter the arguments made by Petitioner with respect to it—arguments which are set out on pages 12 and 13 of the Petition.

The estate tax is a death tax. To be taxable thereunder, any transaction must bear some relationship to the decedent's death. This most basic of all estate tax concepts is supported by the language of section 2036 of the Internal Revenue Code of 1954 itself which specifically provides that a transfer which retained rights is includible only if the retention was "for his life or for any period not

[1] Evidently the Government means "Decedent".

ascertainable without reference to his death or for any period which does not in fact end before his death." Such language was necessary in order to make Sec. 2036 conform with the basic principle that the estate tax is in fact a death tax. The Brief in Opposition admits (p. 5) that the decedent joined in executing an instrument which postponed termination "for a period of years." The decedent in fact survived that period of years. No distortion of language or exercise in mental gymnastics can make a period of years which one in fact survives equivalent to one's lifetime. The retention period provisions of Sec. 2036 have obviously not been met.

If permitted to stand, the decision of the Court of Appeals would be authority for the proposition that the estate tax is not a death tax and would be in direct conflict with the fundamental principle underlying estate taxation, which principle needs no citations for support.

Although the Government alleges that "this case presents no question of general importance" (Br. in Op. 5), it is respectfully submitted that any attempt to change radically the very basis for estate taxation without legislative action is in violation of the fundamental constitutional principle of separation of powers. Even if no other problem were involved in this case, the case would be one of great importance.

2. The decision of the Court of Appeals is based upon a consideration of whether the decedent had an interest in property and whether she had made a transfer thereof. These are very broad concepts because it is a requirement in every instance of estate taxation that an interest in property and a transfer thereof be found. Therefore, the decision of the Court of Appeals can have broad application. It is believed that the Petition for Writ of Certiorari points out the revolutionary conclusions reached by the Court of Appeals regarding these concepts and the utter confusion resulting from its opinion.

It is most significant, however, that the Government's Brief in Opposition makes no attempt whatsoever to present any reasoning which might form a basis for finding that the decedent had an interest in property or that she made any transfer thereof. It merely states the conclusion that the ". . . decedent had a right to receive her share of the trust corpus in 1940. . . ." (Br. in Op. 6), without making any attempt to show that she ever could have exercised that right and received the property. It makes no effort to deal with the fact that her right to receive at a future date was contingent upon her survival of the term of the trust and was subject to postponement by others without her consent. The Government then states the further conclusion: ". . . she relinquished that right by joining with the other beneficiaries and the trustees in extending the trust term" (Br. in Op. 6), without saying how an extension can be considered the same as a transfer when nobody received anything because of the extension. The climax of its presentation is found when it jumps to the further conclusion: "Such relinquishment of her rights in the corpus . . . constituted a 'transfer of her property interest' therein," (Br. in Op. 6), without explaining how her right to receive corpus of a spendthrift trust at a future date has suddenly become a property interest in corpus even though the trust instrument provided that no beneficiary should have any interest in corpus until termination.

Similarly, the Brief in Opposition, at three places on page 8, refers to the fact that the decedent was the owner of a beneficial interest in the trust. It then states (Br. in Op. 8, lines 24, 25) that the beneficiaries "made transfers of their property interests in the trust corpus" but does not explain how a beneficial interest in a spendthrift trust can possibly be the same as a property interest in the corpus. By definition a beneficial interest in a trust is not the equivalent of an interest in the property itself.

The Brief in Opposition (p. 8) states: "She made a transfer. . . . She also retained and exercised a testamentary power of appointment over the corpus." It is the corpus that the Government is attempting to tax. It would have been utterly impossible for the decedent to have transferred corpus and still retain the right to transfer it again by exercising a power of appointment.

The Brief in Opposition is rife with conclusions but is devoid of any reason or logic to support those conclusions. It seems evident, therefore, that its conclusions and those of the Court of Appeals are without foundation. If the language of the decision of the Court of Appeals relating to transfers of interests in property is not promptly nullified, taxpayers and their attorneys cannot possibly predict the results of their planning.

3. The Brief in Opposition contends (p. 5) that the claim of conflict is not well founded and that *Brown* v. *Routzahn*, 63 F. 2d 914, certiorari denied, 290 U.S. 641, differs significantly from the instant case (p. 7). Its contention of differentiation is based upon the fallacious assumption that the beneficiaries in the instant case became owners of the trust corpus in 1918 and that they "made transfers of their property interests in the trust corpus which they owned since 1918." (Br. in Op. 8). Article II of the trust instrument (Supp. R. 19a)[2] provides for the issuance of trust certificates and states that: ". . . they, the said Beneficiaries, shall in no event have any greater interest in this trust estate than is set forth in said certificates." The language of the certificates is set out in Article III (Supp. R. 20a, 21a) and provides in part: "And it is expressly agreed that the holder hereof has no claim or interest, legal or equitable, in the lands and other assets and property described and referred to in said trust agreement, but only an interest in the net income,

[2] "Supp. R." references are to the appendix to the Government's brief filed in the Court of Appeals.

avails or proceeds thereof, as in said instrument provided." The trust agreement provides (Supp. R. 11a): ". . . it being understood, however, that the said Beneficiaries do not intend to, and do not hereby or hereunder, acquire any title to the premises and properties aforesaid, either legal or equitable, but an interest only in the net avails and proceeds of the said premises and properties, which may come therefrom to the said Trustees under the terms and provisions of this agreement." The trust agreement further provides (Supp. R. 22a): "The beneficial interests hereunder and in said certificates are declared to be and shall be personal property, and neither the Beneficiaries herein named, nor the holders of any of the certificates hereunder, at any time, shall have any claim, title or interest, legal or equitable in the lands and other assets and property at any time held by the Trustees under this trust, but only an interest in the income, net avails or proceeds thereof."

Can there be any question but that no beneficiary could have an interest in corpus during the term of the trust?

Still the Government bases its argument for distinguishing the instant case and the *Brown* case on the contention that the beneficiaries become *"owners"* in 1918, (Br. in Op. 8), and even resorts to the use of italics in a desperate effort to add weight to its argument. The fact that no better argument is offered points up the fact that there is no real distinction between the two cases and serves only to emphasize the conflict between them.

After reciting the facts in *Helvering* v. *Grinnell,* 294 U.S. 153, the Government again leaps to a conclusion by stating: "Obviously *Grinnell* has no bearing on the instant case. The issue here does not in any way depend upon whether property passed under the will of the donor of the power of appointment or under the will of the donee of that power." (Br. in Op. 9) *Grinnell* has a direct bearing on the instant case since it is Petitioner's precise

contention that no interest in corpus passed from the donor to the decedent and, if no such interest passed to her, it cannot be part of her estate for estate tax purposes. In attempting to determine whether the beneficiaries had received an interest in property from the donor, *Grinnell* is very much in point because, as it stated (p. 155), "... that result was rejected by the beneficiaries."

4. It is also significant that the Brief in Opposition does not deny the impact that the Court of Appeals decision can have on the disclaimer statutes recently enacted.

Of further significance is the fact that the Brief in Opposition does not mention the valuation problem created for the first time by the opinion of the Court of Appeals and discussed on pages 13 and 14 of the Petition. Perhaps, if nothing else, this case should be remanded for a determination of the value of the decedent's equitable share of trust corpus in the light of the fact that such equitable share was contingent upon survival of the term and subject to postponement by others without the decedent's consent and was in fact so postponed by others beyond the decedent's lifetime so that the decedent, at no time, could have requested and received any portion of corpus.

5. It is especially interesting to note that the Brief in Opposition does not contend that the decision of the Court of Appeals is correct and should be permitted to stand. Indeed it cannot make this assertion because startling results are obtained if the theory expressed by the decision is carried to its logical conclusion:

The Court of Appeals found that an estate tax is assessable because the decedent joined in the 1940 extension amendment. The decedent also joined in the 1950 extension amendment. If the theory expressed by the Court of Appeals is applied to the 1950 extension, it appears

that another taxable event occurred in 1950. At that time the decedent had exactly the same interests that she had in 1940 and performed exactly the same act relative thereto. The two situations are identical. If one is taxable, the other must also be taxable.

However, if the decedent relinquished or transferred her interest in corpus in 1940, by what means did she reacquire that interest so she could again transfer it in 1950? If she again transferred the interest in 1950, how was that interest susceptible of being transferred by her a third time by the exercise of her power to appoint by will?

It is thus seen that the decision of the Court of Appeals cannot be correct because it raises unanswerable questions. It forces the untenable conclusion that one can make multiple taxable transfers of a property interest but can continue somehow to bring the interest back to be transferred again. A consistent application of the decision also leads to the inequitable if not unconstitutional conclusion that the decedent's equitable share in trust corpus should be taxed twice in her estate, once because of the 1940 extension and once because of the 1950 extension.

Apart from ignoring the fact that the decedent had no part in the 1955 extension, the basic flaw in the opinion is the misconception that a postponement is the equivalent of a relinquishment. The word "postpone" means "To defer; to put off; delay;" while the word "relinquish" means "To give up; to renounce a claim to; . . . to forsake." *Webster's New International Dictionary, Second Edition.* In 1940 and 1950 the decedent merely joined in deferring, putting off or delaying the time when she might receive corpus. She did not give up, renounce or forsake her right to corpus and nobody acquired any interest from her. At the end of each period of postponement she had exactly the same rights she had previously had. She could not transfer corpus more than once and

the only transaction which passed any interest to any other person was her tax-free exercise of a power to appoint by will. The only conclusion that is supported by definition and by reason and is consistent with basic concepts of estate taxation is that a postponement is not a relinquishment. It is not a transfer. It is not taxable.

6. The Petition has established the fact that the instant case involves questions of broad public interest and impact (pp. 8, 9, 10 and 12), that there is a conflict that requires a resolution (pp. 8, 9, 11 and 12), and that the Court of Appeals committed obvious errors in not considering the fact that the decedent survived the effective dates of her actions and in not attempting to value the asset it found to have been transferred (pp. 12, 13 and 14).

The results of the decision of the Court of Appeals can be righted only by a decision of this Court which would find:

A. No interest in corpus passed from the donor to the decedent. The decedent could have no interest in corpus until the trust terminated. Never having acquired an interest in corpus, a basic requirement for taxation has not been met.

B. By joining in two extension amendments, the decedent made no transfer because nobody received anything from her as a consequence of such extensions. The only transfer of corpus made by her was pursuant to the tax-free exercise of a limited power of appointment. A mere postponement is not a transfer. To hold otherwise would raise unanswerable questions and would produce a ridiculous result.

C. Any transfer that might have been made was not one under which the decedent retained income for any period covered by Section 2036 of the 1954 Code. The periods established by the extension amendments in which she joined had in fact ended

prior to her death. Her acts bore no relationship to her death. A retention for a specified period which the decedent in fact survived is not a retention for life.

D. Even if it should ultimately be determined that the decedent made a transfer of an interest in property under which she retained income for life, the value of the interest transferred must be determined. The Court of Appeals found that her equitable share in trust corpus is taxable. If this is so, her equitable share must be valued in light of its contingency upon survival of the termination of the trust and its dependency on the failure of others to postpone the term without the decedent's consent, together with the fact that it was so postponed by others beyond her lifetime.

7. The Court of Appeals committed error and an injustice has been done to the taxpayer. If the opinion of the Court of Appeals is not nullified, the same injustice can fall to the remaining beneficiaries of the Jacob Birk Realty Agreement and to all others who are guilty of having made or joined in postponements or of having only beneficial interests in trusts or estates.

The injustice and the error have been compounded by the Government's refusal to discuss a material fact and candidly come to grips with any one of the issues presented.

It may be that the instant case is one in which a summary reversal would be warranted.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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